

07-4370-cr
United States v. Bah

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

August Term, 2008

(Argued: November 25, 2008 Decided: July 31, 2009)

Docket No. 07-4370-cr

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UNITED STATES OF AMERICA,

Appellee,

-v.-

07-4370-cr

BOUBACAR BAH,

Defendant-Appellant.

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Before: JACOBS, Chief Judge, WALKER and
 CALABRESI, Circuit Judges.

Defendant-Appellant Boubacar Bah appeals from a judgment of conviction entered October 5, 2007 in the United States District Court for the Southern District of New York (Kaplan, J.). Bah was convicted after a jury trial on one count of operating an unlicensed money transmitting business in violation of 18 U.S.C. § 1960. We conclude that the district court erred in refusing to give Bah's requested

1 jury instruction on the scope of Section 1960. Vacated and
2 remanded.

3 MICHAEL A. YOUNG, New York, NY,
4 for Defendant-Appellant.

5
6 ANIRUDH BANSAL, Assistant United
7 States Attorney (Christopher
8 LaVigne and Kevin R. Puvalowski,
9 Assistant United States
10 Attorneys, on the brief), for
11 Michael J. Garcia, United States
12 Attorney for the Southern
13 District of New York, New York,
14 NY, for Appellee.

15
16 DENNIS JACOBS, Chief Judge:

17 Defendant-Appellant Boubacar Bah appeals from a
18 judgment of conviction, entered October 5, 2007 after a jury
19 trial in the United States District Court for the Southern
20 District of New York (Kaplan, J.), on one count of operating
21 an unlicensed money transmitting business in New York in
22 violation of 18 U.S.C. § 1960.

23 There is no doubt that Bah received money in New York
24 for transmittal abroad; Bah tried to defend on the ground
25 that the money he received in New York was transmitted from
26 New Jersey, and that he was licensed to operate a money
27 transmitting business in that state. The district court
28 precluded Bah in limine from offering evidence of the New
29 Jersey license, reasoning that the federal statute

1 prohibited operating a money-transmitting business that is
2 unlicensed under state law, and that Section 1960 thus
3 incorporates into federal law the provision in New York
4 Banking Law § 650 that prohibits (inter alia) engaging
5 without a license in the businesses of transmitting money or
6 receiving money for transmission. The court therefore
7 determined that Bah could be convicted under Section 1960 if
8 he engaged in New York in the business of receiving money
9 for transmission without a license, regardless of whether he
10 transmitted the money pursuant to a valid license in New
11 Jersey. The district court gave a jury instruction to that
12 effect at the conclusion of trial.

13 Bah argues that the district court erred in:
14 [i] refusing to give his requested charge on the scope of
15 Section 1960; [ii] precluding him from offering evidence of
16 his New Jersey license; [iii] permitting the government to
17 cross-examine a character witness concerning a five-year-old
18 customer complaint; and [iv] denying him Criminal Justice
19 Act funding to call thirteen witnesses from overseas.

20 We hold that the district court erred in concluding
21 that Section 1960 incorporates into federal law the feature
22 of New York Banking Law § 650 that prohibits engaging in the

1 business of receiving money for transmission without a
2 license. This error tainted the district court's jury
3 charge and the presentation of evidence and argument at
4 trial.

5 We cannot determine from the record whether Bah was
6 convicted for operating an unlicensed money transmitting
7 business, which is prohibited by federal law, or for
8 engaging (without a license) in the business of receiving
9 money for transmission, which is prohibited by New York law,
10 but not federal law. Although the government adduced
11 evidence that Bah (who had several legitimate businesses)
12 had transmitted money abroad from a Banco Popular branch in
13 the Bronx, it is not clear beyond a reasonable doubt that a
14 properly instructed jury would have found that the
15 transmittals from New York were part of a money transmitting
16 business, as opposed to one of Bah's various other
17 enterprises. We therefore vacate Bah's conviction and
18 remand for a new trial. We go on to consider Bah's
19 remaining claims in anticipation of a potential retrial, and
20 find them to be without merit.

21

22

1 **BACKGROUND**

2 In 2003, Drug Enforcement Administration agents
3 learned that heroin traffickers in the Bronx had used a
4 company named B&S Bah Enterprises to transmit suspected drug
5 proceeds. Agents discovered that B&S Bah Enterprises was
6 operated by Bah from an office in a restaurant he owned at
7 1715 Webster Avenue in the Bronx, New York. When agents
8 arrested Bah on April 21, 2006, he consented to a search of
9 his restaurant in the Bronx and of his home and office in
10 Fort Lee, New Jersey, and he answered the agents' questions
11 about his businesses.

12 On February 27, 2007, Bah was charged in a three-count
13 indictment with conspiring to commit money laundering, in
14 violation of 18 U.S.C. § 1956(h); operating an unlicensed
15 money transmitting business, in violation of 18 U.S.C.
16 § 1960; and making false statements at a December 21, 2006
17 meeting with the government, in violation of 18 U.S.C.
18 § 1001. On the eve of trial, the money laundering count was
19 severed because the government's key witness had fled to
20 Africa. Trial on the remaining two counts commenced on
21 April 4, 2007, and concluded on April 6, 2007, when the jury
22 convicted Bah on the money-transmitting count and acquitted

1 him on the false-statements count.

2 **The Government's Case.** At trial, the government
3 introduced evidence establishing that certain customers came
4 to Bah's restaurant in the Bronx, delivered U.S. currency,
5 and instructed Bah to deliver the equivalent value of local
6 currency to recipients in West Africa. Bah provided Bronx
7 customers with receipts and/or codes to ensure that the
8 money was received by the correct party overseas.

9 The government's evidence included testimony from four
10 customers who delivered money to Bah in the Bronx for
11 transmission to Guinea or Sierra Leone. The physical
12 evidence consisted mainly of items seized from the office at
13 the back of the restaurant on Webster Avenue: a laptop
14 computer; an electric money counter; "money receipts for [a]
15 money transmission business" (blank and filled out); faxes
16 addressed to Bah requesting "transfers" of United States
17 currency; spreadsheets and ledgers bearing the name B&S Bah
18 Enterprises and the Bronx address, and showing records of
19 money transfers; business cards for B&S Bah Enterprises at
20 the Webster Avenue address, with Bah listed as "President,"
21 and the words "Money Transfer, Import & Export, Shipping";
22 and a commercial lease application dated July 18, 2002,

1 signed by Bah, for "B&M Bah Money Remittance Corp.," listing
2 Bah's "Existing Business Address" as 1715 Webster Avenue in
3 the Bronx, and Bah's "Years in Business" as "6 years."

4 The government also introduced bank records showing
5 that B&S Bah Enterprises transferred more than \$1.2 million
6 through a Banco Popular branch in the Bronx, during the
7 period from January 2002 through August 2002. The account
8 was opened in October 2001 in Bah's name and listed 1715
9 Webster Avenue as the company's address. At the time Bah
10 closed the account, the bank was investigating his account
11 activity because of the number of monthly deposits, and
12 because 95 to 97 percent of the deposit proceeds were
13 transferred to foreign accounts.

14 Other prosecution evidence included a statement from a
15 2004 civil deposition in which Bah explained the operation
16 of his money transmitting business and his arrangement for
17 transferring money through businesses in Africa; and a
18 letter, dated October 14, 1999, to the then Immigration and
19 Naturalization Service ("INS"), on letterhead of "B&S Bah
20 Enterprises" with the Bronx address, advertising "Import &
21 Export," "Money Transfer[]," and "Shipping" services. Bah's
22 letter to the INS explained that the purpose of his business

1 was to arrange the transfer of funds to countries in West
2 Africa.

3 The government introduced Bah's admissions to federal
4 agents: that he had looked into obtaining a money
5 transmitting license in New York State, but determined that
6 it was too expensive;¹ that he had money transmitting
7 receipts at his restaurant in the Bronx because he often
8 brought documents from New Jersey to do "accounting work" in
9 New York; and that, of the \$50,000 to \$60,000 he collected
10 each week, \$15,000 to \$20,000 was collected in New York.

11 Bah stipulated at trial that neither he nor B&S Bah
12 Enterprises had ever been licensed by the State of New York
13 for the businesses of receiving money for transmission or
14 transmitting money and that B&S Bah Enterprises had never
15 registered with the United States Treasury as a money
16 transmitting business.

17 **Bah's Defense.** Bah testified as follows in his own
18 defense. He opened B&S Bah Enterprises in New York in 1999
19 as a means by which African immigrants living in this
20 country could avoid corruption and theft in certain African

¹ Bah testified at trial that he would have needed \$500,000 cash to obtain a license in New York because of bond requirements.

1 banking systems. In exchange for payment in the United
2 States, Bah's company purchased products (such as food,
3 clothing, electronics, and building supplies) that were
4 delivered to his native Guinea and other African countries.

5 After several years of operating his export/import
6 business, Bah was approached by customers wanting to safely
7 deliver cash to friends and family in Africa. To meet this
8 need, Bah opened a money transmitting business in New Jersey
9 named B&M Bah Enterprises, Inc.²

10 Bah did not transfer money directly from the United
11 States to Africa. Rather, he set up a system whereby
12 customers in the United States gave him cash, which he used
13 to purchase goods to sell in Africa. Bah then sold those
14 goods to African merchants and used the proceeds to pay
15 money transfer recipients.

16 Bah did not operate a money transmitting business prior
17 to opening his New Jersey business in 2002; records pre-
18 dating that business concerned the transmission of money
19 overseas for the purpose of purchasing goods for export.

² Although Bah was not permitted to introduce evidence of his New Jersey money transmitting license at trial, it is undisputed that Bah obtained such a license on or about June 13, 2002, and that he registered his New Jersey business with the federal government on or about September 23, 2002.

1 Bah called three character witnesses who testified to
2 his reputation for truthfulness in the community. The
3 witnesses also testified that they had delivered money to
4 Bah in the United States as payment for the delivery of food
5 or goods to Guinea. Bah stopped calling character witnesses
6 after the district court permitted the government to cross-
7 examine a witness regarding an unsigned 2002 letter
8 allegedly written by one of Bah's customers accusing him of
9 fraud and theft.

10 **Sentencing.** At sentencing, it was determined that Bah
11 had an offense level of four and a Criminal History Category
12 of one, resulting in a United States Sentencing Guidelines
13 ("Guidelines") range of 0-6 months' incarceration. The
14 district court adopted the Probation Department's
15 recommendation and sentenced Bah to a term of one year's
16 probation and a \$1,000 fine. The district court explained
17 that no greater sentence was necessary because the crime of
18 conviction was a strict liability offense, and it appeared
19 that Bah was attempting to follow the law while supporting
20 himself and serving a legitimate need in his community. The
21 district court declined to resolve outstanding Guidelines
22 calculation issues because it considered that the sentence

1 it was imposing was sufficient to satisfy the factors set
2 forth in 18 U.S.C. § 3553. Neither party challenges the
3 sentence imposed by the district court. It is unclear
4 whether Bah has served his sentence; but the ramifications
5 of his conviction under the immigration laws may be
6 significant.

8 DISCUSSION

9 I

10 A. Scope of 18 U.S.C. § 1960

11 Bah was convicted under 18 U.S.C. § 1960, which
12 provides (in relevant part):

13 (a) Whoever knowingly conducts, controls,
14 manages, supervises, directs, or owns all
15 or part of an unlicensed money
16 transmitting business, shall be fined in
17 accordance with this title or imprisoned
18 not more than 5 years, or both.

19 18 U.S.C. § 1960(a). “[T]he term ‘money transmitting’
20 includes transferring funds on behalf of the public by any
21 and all means including but not limited to transfers within
22 this country or to locations abroad by wire, check, draft,
23 facsimile, or courier.” Id. § 1960(b)(2). An “unlicensed
24 money transmitting business” includes “a money transmitting

1 business which affects interstate or foreign commerce in any
2 manner or degree and . . . is operated without an
3 appropriate money transmitting license in a State where such
4 operation is punishable as a misdemeanor or a felony under
5 State law.”³ Id. § 1960(b)(1)(A).

6 New York Banking Law § 650 is one such licensing
7 statute.⁴ Subsection (2)(a)(1) establishes licensing
8 requirements for two distinct activities: “[i] engag[ing] in
9 the business of receiving money for transmission or
10 [ii] transmitting the same.” Only the latter licensing

³ The other kind of unlicensed money transmitting business relevant under Section 1960 is one that “fails to comply with the money transmitting business registration requirements under section 5330 of title 31, United States Code.” 18 U.S.C. § 1960(b)(1)(B).

⁴ New York Banking Law § 650 provides that “[a]ny person who . . . engages in the business of receiving money for transmission or transmitting the same . . . without a license therefor obtained from the superintendent as provided in this article, shall be guilty of a Class A misdemeanor.” N.Y. Banking Law § 650(2)(a). New York Banking Law § 650(2)(b) provides increased penalties for offenses involving the transfer of \$10,000 or more in a single transaction, a total of \$25,000 or more during a period of thirty days or less, or a total of \$250,000 or more during a period of one year or less. The New York Banking Law “makes the operation of an unlicensed money transmitting business either a misdemeanor or a felony, which in turn subjects the offender to federal criminal penalties under 18 U.S.C. § 1960.” United States v. Velastegui, 199 F.3d 590, 594 (2d Cir. 1999).

1 requirement, however, is incorporated into federal law:
2 Section 1960 explicitly defines "money transmitting" as
3 "transferring funds on behalf of the public by any and all
4 means." 18 U.S.C. § 1960(b)(2); see also S. Rep. No.
5 101-460, at 36 (1990), reprinted in 1990 U.S.C.C.A.N. 6645,
6 6681 ("'Money transmitting' means transferring funds on
7 behalf of the public."). The federal statute does not
8 mention the receipt of money for transmission.

9 It is not surprising that the New York statutory
10 prohibition is broader than the federal. Section 1960 "was
11 enacted in order to combat the growing use of money
12 transmitting businesses to transfer large amounts of the
13 monetary proceeds of unlawful enterprises." United States
14 v. Velastegui, 199 F.3d 590, 593 (2d Cir. 1999) (citing S.
15 Rep. No. 101-460, at 14 (1990), reprinted in 1990
16 U.S.C.C.A.N. 6645, 6658-59). The statute is designed, inter
17 alia, to prevent the movement of funds in connection with
18 drug dealing and terrorism. H.R. Rep. No. 107-250(I), at 54
19 (2001). For these purposes, it is sufficient to be able to
20 identify and monitor the transmissions themselves.

21 The New York statute reflects that state's broader
22 interest in licensing and regulating financial institutions.

1 See, e.g., N.Y. Banking Law § 642(1) (requiring
2 Superintendent of Banks to assess the “financial condition
3 and responsibility, financial and business experience,
4 character and general fitness” of a prospective money
5 transmission licensee and to determine whether “the
6 applicant’s business will be conducted honestly, fairly,
7 equitably, carefully[,], efficiently . . ., and in a manner
8 commanding the confidence and trust of the community”). New
9 York also stands to lose licensing fees if licensees from
10 (say) New Jersey can seek business in New York. See N.Y.
11 Banking Law §§ 18-a(4), 641(3) (prescribing an
12 “investigation fee” for any application for a money
13 transmitting license). However, the broader prohibitions of
14 the New York statute do not expand the reach of the federal
15 statute.

16 **B. Bah’s Requested Jury Instruction**

17 We review de novo a district court’s refusal to issue a
18 requested jury instruction. United States v. Desinor, 525
19 F.3d 193, 198 (2d Cir. 2008). “[T]he defendant ‘bears the
20 burden of showing that the requested instruction accurately
21 represented the law in every respect and that, viewing as a
22 whole the charge actually given, he was prejudiced.’”

1 United States v. Nektalov, 461 F.3d 309, 313-14 (2d Cir.
2 2006) (quoting United States v. Wilkerson, 361 F.3d 717, 732
3 (2d Cir. 2004)).

4 Pre-trial, the district court observed that New York
5 Banking Law § 650 "makes it unlawful to 'engage[] in the
6 business of receiving money for transmission,'" and ruled
7 that there would be a violation of federal law "if
8 defendant's activities in New York amounted to engaging in
9 th[at] business." United States v. Bah, No. S1 06 CRIM.
10 0243 LAK, 2007 WL 1032260, at *3 (S.D.N.Y. Mar. 30, 2007)
11 (alteration in original, emphasis omitted). The district
12 court thus assumed that because New York law on the subject
13 prohibits "engag[ing] in the business of receiving money for
14 transmission," federal law does likewise. That assumption
15 was error.

16 At the conclusion of trial, Bah requested the following
17 jury instruction on the scope of Section 1960:

18 1960 does not make it unlawful to receive
19 money for transmission without a license.
20 It makes it unlawful to engage in the
21 business of receiving money for
22 transmission. There was a violation of
23 the statute only if defendant's
24 activities amount[ed] to engaging in the
25 business of receiving money for
26 transmission, not if his activities
27 constituted merely receiving money for

1 transmission.

2 The government objected to this instruction on the ground
3 that it made insufficiently clear that Bah could be
4 convicted if he engaged in the business of receiving money
5 for transmission. The district court agreed: the problem
6 was the final clause, which stated that there was no
7 violation of the statute "if his activities constituted
8 merely receiving money for transmission." The court found
9 this clause potentially misleading, because "merely
10 receiving money for transmission" could violate the statute
11 if the receipt was sufficiently frequent and the volume
12 sufficiently great to constitute a business.

13 Bah argued that no matter how often he received money
14 in New York, any activity there was ancillary to his
15 licensed New Jersey business and not unlawful, "especially
16 because no money was ever transmitted in New York." Before
17 the charging conference ended, Bah sought an instruction
18 consisting of one sentence: "1960 does not make it unlawful
19 to receive money for transmission without a license." The
20 government objected on the same ground as before, and the
21 district court rejected this formulation as well. Bah's
22 first requested charge would have done him little good, and

1 we express no view on the denial of that request; the second
2 requested charge went to the heart of the matter, and the
3 denial of that request was error.⁵

4 The jury was instructed (accurately, as far as it went)
5 "that the laws of New York State require that any person who
6 engages in the business [of] receiving money for
7 transmission or of transmitting money to be licensed as a
8 money transmitter by the New York State Department of
9 Banking," and that "the parties in this case have
10 stipulated, in other words[,] they have agreed, that the
11 defendant never obtained a license from the State of New
12 York to engage in the business of receiving money for
13 transmission or for transmitting money." But absent the
14 one-sentence charge requested by Bah, the jury had no
15 occasion to focus on whether Bah conducted an unlicensed

⁵ Bah's initial request suffered from the same infirmity as the instruction given by the district court: it would have permitted the jury to convict if Bah was in the business of receiving money for transmission. To the extent that Bah's initial request inaccurately stated the law, it was consistent with the flawed analysis in the district court's in limine ruling, which was binding at trial. Thus, Bah initially sought the best instruction he could reasonably hope for given the district court's ruling. When the district court rejected that proposal, Bah requested a legally accurate instruction reflecting his understanding of the scope of Section 1960. Bah secured a ruling on that request and preserved the issue for appellate review.

1 business of transmitting money from New York.

2 Bah's requested charge constituted an accurate
3 statement of the law: while New York law prohibits engaging
4 in the unlicensed business of receiving money for
5 transmission, federal law does not. Even viewing the
6 district court's charge as a whole, we conclude that the
7 jury was likely misled as to the scope of Section 1960 in
8 the absence of Bah's requested language.

9 At oral argument on appeal, the government explained
10 resourcefully [i] that Section 1960 prohibits "conduct[ing],
11 control[ling], manag[ing], supervis[ing], direct[ing], or
12 own[ing] all or part of an unlicensed money transmitting
13 business," 18 U.S.C. § 1960(a) (emphasis added), and
14 [ii] that receiving money is "part" of conducting a money
15 transmitting business. However, even accepting the
16 government's analysis, the receipt of money would be
17 prohibited only if it is incident to "an unlicensed money
18 transmitting business." Thus, it would be a defense to the
19 federal charge (not a basis for conviction) that Bah
20 received money in New York (in violation of the New York
21 licensing laws) and transmitted the money via his licensed

1 business in New Jersey.⁶

2 **C. Harmless Error Analysis**

3 "An erroneous instruction, unless harmless, requires a
4 new trial." Anderson v. Branen, 17 F.3d 552, 556 (2d Cir.
5 1994). "An error is harmless only if it is clear beyond a
6 reasonable doubt that a rational jury would have found the
7 defendant guilty absent the error." United States v.
8 Quattrone, 441 F.3d 153, 177 (2d Cir. 2006) (internal
9 quotation marks omitted).

10 Under the jury charge as given, Bah's defense at trial
11 --that he received money in New York for transmission in New
12 Jersey--amounted to a concession of guilt. Bah was entitled
13 to an unqualified instruction that the receipt of money in
14 New York for transmission from New Jersey was no violation
15 of federal law. The proviso (emphasized in the charge) that
16 Bah must have been engaged "in the business" of receiving

⁶ An issue was raised at oral argument as to whether Bah receiving money in New York and transporting it to New Jersey would itself constitute unlawful transmission, because the statute prohibits unlicensed "transfers within this country." 18 U.S.C. § 1960(b)(2). So long as Bah (or his agents) maintained possession of any payments, the movement of the money across state lines would not itself violate the statute, because Section 1960 prohibits the "transfer" of money, not the transportation of money by an individual.

1 money for transmission did not repair the omission.

2 The charge sharply undermined Bah's argument that his
3 activities in New York were ancillary to his New Jersey
4 business. Defense counsel tried arguing to the jury several
5 times that Bah could not be convicted for receiving money in
6 New York, but the district court sustained the government's
7 objections.

8 The prejudice was exacerbated by the emphasis placed by
9 the government on particular evidence. For example, the
10 government made much of the fact that \$15,000 to \$20,000 of
11 the \$50,000 to \$60,000 Bah received weekly was collected in
12 New York. But under Section 1960 it should not matter how
13 much money Bah received in New York, unless he transmitted
14 it in violation of New York law. Similarly, the government
15 highlighted a stack of blank receipts found in the Bronx
16 restaurant. But because the receipts were not evidence of
17 transmission, they would not be decisive to a properly
18 instructed jury.

19 The government argues in its brief that its "most
20 direct[]" evidence consisted of "the essentially
21 uncontradicted testimony of four of Bah's customers" who
22 dropped off money in the Bronx that was later transferred to

1 Africa. But those witnesses did not testify as to how--or
2 from where--the money was transmitted. The fact that the
3 witnesses dropped off money that later arrived in Africa is
4 not inconsistent with Bah's defense that he received money
5 in New York for transmission from New Jersey. The existence
6 of the New Jersey license thus makes this an unusual case.⁷

7 Much of the government's remaining evidence was not
8 probative as to Bah's operation of an unlicensed money
9 transmitting business in New York during the indictment
10 period. For example, the government introduced bank
11 records, correspondence, receipts, and business records that
12 predated the time of the alleged violation of section 1960.

⁷ Ordinarily, evidence that customers delivered money for transmission overseas, and that the money was in fact transmitted overseas, would be powerful evidence in a prosecution under Section 1960. But this was not an ordinary Section 1960 prosecution. No circuit court has addressed a case in which a defendant who operated a licensed, registered money transmitting business was charged with operating an unlicensed business in a neighboring state. Two cases from our Court are instructive as to the types of cases that are typically brought under the statute. In Velastegui, we analyzed New York law and held that the "agent of a licensee who transmits money directly to a foreign country . . . is operating a money transmitting business without a license as prohibited by section 1960." 199 F.3d at 595 (emphasis added). In United States v. Elfgeeh, 515 F.3d 100, 110 (2d Cir. 2008), we affirmed the convictions where the defendants knew they needed to obtain a license to transmit money, but never obtained a license in any state.

1 The government also introduced numerous records of money
2 transfers from New Jersey, which were executed lawfully
3 pursuant to Bah's New Jersey license. Bah could not
4 properly have been convicted based on this evidence.

5 To prove a violation of Section 1960, the government
6 was required to come forward with evidence that Bah was in
7 the business of transmitting money from New York during the
8 period charged in the indictment: January 1, 2002, up to and
9 including August 21, 2006. The government introduced two
10 kinds of evidence that would show such a violation: bank
11 records showing that (from January 2002 through August 2002)
12 B&S Bah Enterprises transferred more than \$1.2 million
13 through a Banco Popular branch in the Bronx; and
14 spreadsheets and charts (from March 2002 through August
15 2002) bearing the address of the Bronx restaurant, with
16 columns on senders' and recipients' names, a column headed
17 "refunds," a column with codes for recipients in Africa, and
18 lists of sums in United States dollars with names and
19 contact information for individuals in Conakry, Guinea.
20 These bank records, spreadsheets, and charts were probative
21 evidence that Bah operated an unlicensed money transmitting
22 business in New York.

1 However, Bah rebutted this evidence. He testified that
2 the transfers from Banco Popular were to facilitate the sale
3 of goods such as televisions, food, and oil, and that the
4 Banco Popular account was never used to send to cash to
5 overseas recipients. With respect to the spreadsheets, Bah
6 testified that he listed transactions by dollar amount--
7 instead of by the quantity of good to be delivered--to
8 account for fluctuations in currency exchange rates, so that
9 overseas recipients would receive goods equal to the dollar
10 value paid by United States customers.

11 There is reason to think that the jury found Bah's
12 testimony credible: Bah was acquitted on the count that
13 charged him with lying to government agents when he told
14 them [i] that he never remitted money through his New York
15 business and [ii] that he first began operating a money
16 transmitting business in the summer of 2002. Bah contested
17 this charge by testifying that his New York business only
18 engaged in the import and export of goods. His acquittal
19 suggests that the jury believed his testimony.

20 In order for the jury to have acquitted as to false
21 statements while convicting as to money transmission, it
22 seems more than likely that its verdict on money

1 transmission rested on something other than Bah transmitting
2 money from New York. That something, under the district
3 court's charge, would have been Bah's receipt of money in
4 New York for transmission from New Jersey. In short, given
5 the jury's verdict, we cannot conclude beyond a reasonable
6 doubt that a properly instructed jury would have found Bah
7 guilty.

8 "Where an instruction defining one of two alternative
9 grounds is legally erroneous, a court must reverse unless it
10 can determine with absolute certainty that the jury based
11 its verdict on the ground on which it was correctly
12 instructed." United States v. Joseph, 542 F.3d 13, 18 (2d
13 Cir. 2008). In this case, the district court's instruction
14 left the jury free to convict for either of two activities
15 prohibited by New York Banking Law § 650(2)(a)(1):

16 "[i] engag[ing] in the [unlicensed] business of receiving
17 money for transmission or [ii] transmitting the same."

18 Given the strength of the government's evidence as to
19 receipt (and Bah's concession that many customers left money
20 in New York for him to transmit from New Jersey), the jury
21 had no need or reason to reach the decisive (and more
22 difficult) question of whether Bah transmitted money from

1 New York.

2 The jury charge allowed Bah to be convicted for lawful
3 activity incident to his New Jersey business. Because we
4 are not "absolute[ly] certain[]" that the jury found Bah
5 guilty for the appropriate reason, Bah is entitled to a new
6 trial.

7

8 **II**

9 Bah challenges the grant of the government's motion in
10 limine to preclude evidence that he was licensed to conduct
11 a money transmitting business in New Jersey. "We review a
12 district court's evidentiary rulings for abuse of
13 discretion, and will reverse only if we find that there was
14 a violation of a substantial right." United States v.
15 Ebbers, 458 F.3d 110, 122 (2d Cir. 2006).

16 The district court precluded the introduction of
17 evidence of Bah's New Jersey license after concluding that
18 Section 1960 and New York Banking Law § 650 both impose
19 strict liability on the operator of an unlicensed money
20 transmitting business, and that neither statute requires a
21 defendant to know that he must obtain a license. Bah does
22 not challenge these legal conclusions. Rather, he argues

1 that the ruling erroneously prevented him from arguing that
2 he "reasonably believed" his limited activities in New York
3 did not constitute operating a money transmitting business
4 in that state.

5 The district court did not abuse its discretion in
6 ruling, before trial, that Bah could not offer evidence of
7 his New Jersey license. If the presentation of evidence had
8 been limited to Bah's money transmitting activities in New
9 York, evidence of Bah's New Jersey license would not have
10 supported a viable defense.⁸

11 We do not hold, however, that the district court would
12 have erred had it denied the government's motion. The
13 district court's evidentiary ruling responded to arguments
14 premised on each party's theory of how to try the case,
15 which were in turn influenced by the district court's
16 expressed view of what the government had to prove. This

⁸ Having prevailed on its in limine motion to preclude Bah from introducing evidence of his New Jersey license, the government introduced reams of bank records from New Jersey showing money transfers related to Bah's New Jersey business. By introducing this evidence, the government arguably opened the door to Bah introducing evidence of his New Jersey license, but this argument was not raised at trial or on appeal. Cf. United States v. Stewart, 433 F.3d 273, 308 (2d Cir. 2006); United States v. Beers, 189 F.3d 1297, 1300 (10th Cir. 1999).

1 opinion alters the case, and re-conceives the nature of the
2 offense the government can prosecute. The court may wish to
3 reconsider its ruling if the government elects to conduct a
4 second trial.

5
6 **III**

7 Bah contends that the district court improperly
8 permitted the government to cross-examine one of his
9 character witnesses about a letter from a former customer
10 accusing him of fraud.

11 Federal Rule of Evidence 404(a)(1) permits a defendant
12 to offer character evidence. If a defendant chooses to
13 introduce such evidence, the government may question the
14 defendant's witnesses regarding "relevant specific instances
15 of conduct." Fed. R. Evid. 405(a). "We review the district
16 court's decision to allow the question[ing] for abuse of
17 discretion, bearing in mind that once a defendant offers
18 character testimony, the prosecution is afforded substantial
19 latitude to rebut such evidence." United States v. Reich,
20 479 F.3d 179, 190 (2d Cir. 2007) (internal quotation marks,
21 citations and alteration omitted).

22 Bah called three character witnesses. One of them,

1 Amadou Diallo, testified that Bah had a reputation for
2 truthfulness in the community, and cited an instance in
3 which Bah helped resolve a situation between Diallo and
4 Bah's brother. On cross-examination, the district court
5 permitted the government--over Bah's objection--to question
6 Diallo about a letter in which a former customer accused Bah
7 of fraud. Diallo testified that he was unaware of the
8 accusation and that it did not impact his view of Bah or his
9 reputation in the community.

10 Bah cites the Eighth Circuit's decision in United
11 States v. Monteleone, 77 F.3d 1086 (8th Cir. 1996), for the
12 proposition that a prosecutor may only cross-examine a
13 character witness based on events "likely to have become a
14 matter of general knowledge, currency or reputation in the
15 community," id. at 1090 (internal quotation marks omitted).
16 In Monteleone, the character witness was cross-examined
17 about the defendant's alleged perjury before a grand jury
18 investigating a drug crime. Id. Because grand jury
19 proceedings are required by law to be kept secret,
20 Monteleone ruled that the government lacked a good faith
21 basis for believing that the defendant's alleged perjury was
22 likely to have been known in the witness's community. Id.

1 Monteleone, of course, is not binding in our circuit,
2 but even if it were, this case is distinguishable for three
3 reasons. First, the evidence presented on cross-examination
4 did not derive from a secret proceeding; to the contrary,
5 the author of the letter expressed a desire that Bah's
6 actions be widely publicized to other customers and the
7 Better Business Bureau. Second, the challenged evidence did
8 not involve criminal conduct, but dishonesty in Bah's
9 business dealings--information closely related to the
10 subject of Diallo's direct testimony, and far less
11 inflammatory (and potentially prejudicial) than the evidence
12 at issue in Monteleone. Third, we have previously observed
13 that the Eighth Circuit has limited Monteleone to cases
14 involving reputation evidence and that it has been more
15 permissive in admitting evidence to impeach opinion
16 testimony. See Reich, 479 F.3d at 190-91. In this case,
17 Diallo testified as to his personal opinion of Bah. For
18 these reasons, Monteleone is unpersuasive.

19 In light of the "substantial latitude" afforded the
20 government to rebut character witness testimony offered by
21 the defense, the district court did not abuse its discretion
22 in permitting the government to question Diallo about the

1 complaint against Bah.

2
3 **IV**

4 Bah's final challenge is to the district court's denial
5 of funds to fly thirteen defense witnesses from overseas to
6 testify at trial, and to fly Bah's counsel overseas to
7 depose three witnesses. Bah argues, inter alia, that:
8 [i] he was denied his Due Process right to present a
9 complete defense, see California v. Trombetta, 467 U.S. 479
10 (1984); [ii] he was denied his Sixth Amendment rights to
11 compulsory process and confrontation of witnesses, see
12 Howard v. Walker, 406 F.3d 114 (2d Cir. 2005); [iii] he was
13 denied equal protection of the laws because of his inability
14 to pay for a defense, see Ake v. Oklahoma, 470 U.S. 68
15 (1985); and [iv] he was denied his right under the Criminal
16 Justice Act ("CJA") to funding for "services necessary for
17 adequate representation," 18 U.S.C. § 3006A(e)(1).

18 A district court may authorize the expenditure of funds
19 exceeding \$500 under the CJA only when "necessary for
20 adequate representation." 18 U.S.C. § 3006A(e)(1)-(2); see
21 also United States v. Durant, 545 F.2d 823, 827 (2d Cir.
22 1976) (discussing necessity requirement for requests for CJA

1 funding). A similar necessity requirement applies to
2 requests under Federal Rule of Criminal Procedure 15, which
3 governs taking depositions in criminal trials, and Federal
4 Rule of Criminal Procedure 17(b), which directs district
5 courts to issue subpoenas on behalf of indigent defendants
6 and provides for payment of costs for those witnesses.

7 The decision to grant or deny funding under these rules
8 is committed to the discretion of the district court. See
9 United States v. Salameh, 152 F.3d 88, 118 (2d Cir. 1998)
10 (explaining that a district court judge is "obligated to
11 exercise his discretion" in determining whether funds are
12 necessary under the CJA (internal quotation marks omitted));
13 United States v. Whiting, 308 F.2d 537, 541 (2d Cir. 1962)
14 ("[A] motion made under Rule 15 is addressed to the
15 discretion of the trial court.").

16 Bah failed to establish that the witnesses were
17 necessary for his defense. The testimony Bah wished to
18 elicit would, at best, have established that the particular
19 witnesses called from overseas did not work with Bah in a
20 money transmitting business prior to the date (September 23,
21 2002) that Bah registered his New Jersey business with the
22 federal government. Such evidence would not have dissuaded

1 a jury from finding that Bah operated an unlawful business
2 in that time with other people. Further, the evidence
3 lacked probative value with respect to Bah's activities
4 after September 23, 2002.

5 Bah's request also lacked specificity as to: whether
6 the witnesses had agreed to fly to this country, whether
7 they could obtain visas, what countries they would be flying
8 from, why the testimony of all thirteen witnesses was
9 necessary, or what their dealings with Bah were. Similarly,
10 Bah provided no estimate of expense. See United States v.
11 Knox, 540 F.3d 708, 717-19 (7th Cir. 2008) (affirming denial
12 of funding request under CJA and Rule 15 for flying attorney
13 to West Africa to investigate and depose witnesses because
14 request and cost estimate were not sufficiently specific).
15 The district court did not abuse its discretion in denying
16 Bah's unqualified request for funds.

18 CONCLUSION

19 Because the district court erred in refusing to give
20 Bah's requested charge on the scope of Section 1960, Bah's
21 conviction is vacated, and the case is remanded for a new
22 trial.